

DAVID CHANG TAI KIM

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v.

DATUK CONRAD MOJUNTIN

HIGH COURT SABAH & SARAWAK, KOTA KINABALU

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ABDUL RAHMAN SEBLI JC

[CIVIL SUIT NO: K22-188-2007]

8 JUNE 2010

TORT: *Negligence - Duty of care - Victim killed by defendant acting in self defence - Whether victim's death actionable in negligence - Whether duty of care is owed to a neighbour who threatens another with injury to his person, property or interest - Whether defending one's own life, property or interest is a civil wrong*

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The plaintiff brought an action against the defendant in respect of his son's ('the victim's') death. The plaintiff claimed that the victim was negligently shot dead by the defendant. For the plaintiff, PW5 testified that in the wee hours of 23 October 2005, he (PW5), the victim and two other friends had gone to the State Library to settle a score with the defendant's sons. At the library, the defendant and a group of people armed with pieces of wood and iron pipes were present. After PW5 and his friends had alighted from their car, the defendant took out a shotgun from a Land Rover and aimed it towards PW5 and his friends. As PW5 and his friends hurriedly attempted to get back into their car, the defendant fired twice at them. The defendant however claimed that on the day in question, he had been informed that his sons had been attacked by several men armed with swords and other weapons. He went looking for his sons armed with his shotgun and accompanied by several family members. The defendant's party ended up in front of the State Library when a car screeched to a halt towards them. Several men then rushed out of the car holding weapons. The victim was one of those men. The victim charged towards the defendant waving a Samurai sword. The defendant pulled out his shotgun and fired a warning shot in the air. The victim was not deterred and kept on charging. The defendant fired again hitting the victim. An independent witness – DW2 – testified that the victim was indeed rushing towards the defendant armed with a 'long object' when shot. DW2 also testified that he had seen a Samurai sword lying by the right side of the victim after the victim had been shot. This sword

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- A was apparently kicked away by one Edo, before being picked up by
a policeman who arrived at the scene. The defendant did not deny
causing the victim's death but pleaded that he had done so because
the victim had threatened his life. The issue before the High Court
was whether death caused by the exercise of private defence was
B actionable in negligence.

Held (dismissing the claim with costs):

- (1) The burden was on the plaintiff to prove that the defendant was
negligent when he shot and killed the victim, pursuant to
C s. 101 of the Evidence Act 1950. (para 2)
- (2) PW5's evidence was inherently improbable. The High Court was
inclined to accept the defendant's testimony. The defendant's
version was more probable having regard to the surrounding
D circumstances of the case. The defendant's evidence was also
corroborated by the evidence of an independent witness – DW2
– whom the High Court found to be a simple, straightforward
witness without any bias towards the defendant. Further, DW2's
evidence on the Samurai sword was corroborated by three police
E witnesses. The evidence of DW2 and the police witnesses was
not contradicted by the plaintiff and left the court with the
uncontradicted evidence that Edo tried to kick away a Samurai
sword that was lying next to the victim's body. The presence of
the sword went a long way in proving the truth of the
F defendant's testimony that the victim was armed when he was
shot. (paras 14, 19-25 & 31)
- (3) The result of police investigations led by DW4 – a police officer
from Bukit Aman – specially directed to take over local
G investigations revealed that the defendant had shot the victim in
self defence. The fact that the Public Prosecutor had not
charged the defendant in connection with the death of the
victim showed that in all probability, the defendant had indeed
acted in self defence. (paras 32 & 33)
- (4) The mere fact that a man is injured by another's act in itself
H grounds no cause of action. If the act is deliberate, the party
injured will have no claim in law even though the injury is
intentional, so long as the other party was merely exercising a
legal right. Thus, no duty of care is owed to a neighbour who
I threatens another with injury to his person, his property or his

interest, pecuniary or otherwise. To impose such a duty is to accord protection to the wrong party instead of the wronged party. The law will fail to protect the community if defending one's own life, property or interest becomes a civil wrong. It is morally and legally reprehensible to reward such plaintiff with damages in an action founded on negligence. In all such cases the loss must lie where it falls. *Grant v. Australian Knitting Mills Ltd & Ors* (foll). (para 37)

- (5) The defendant was indeed under a reasonable apprehension that his death would be the consequence, if he had not fired the shot that killed the victim. Since he was merely exercising his legal right of private defence the question of being negligent did not arise at all. (para 38)

Case(s) referred to:

Caswell v. Powell Collieries Ltd [1939] 3 All ER 722 (**refd**)

Donoghue v. Stevenson [1932] AC 562 (**refd**)

Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co Ltd [1985] AC 210 (**refd**)

Grant v. Australian Knitting Mills Ltd & Ors [1936] AC 85 (**foll**)

Legislation referred to:

Evidence Act 1950, s. 101

Penal Code, s. 302

For the plaintiff - Ram Singh (Loretto S Padua with him); M/s Ram Singh Harbans & Co

For the defendant - Zahir Hussein Ahmad Shah; M/s Zahir Shah & Co

Reported by Andrew Christopher Simon

JUDGMENT

Abdul Rahman Sebli JC:

The Claim

[1] The plaintiff is the father of the late Anthony Chang Kim Fook (the deceased) who was shot dead by the defendant between 4.20am and 4.45am on 23 October 2005 in front of the State Library at Donggongon town, Penampang. The plaintiff is suing in his capacity as the Administrator and Personal Representative of the estate of the deceased. The claim is for damages in respect of the deceased's death.

A [2] The claim raises the question whether an action in negligence
lies where death is caused in the exercise of the right of private
defence. The defendant, a former Cabinet Minister with the State
B Government of Sabah did not deny that he caused the death of the
deceased but pleaded that he did so because the deceased was
threatening his life. The burden is on the plaintiff to prove that the
defendant was negligent when he shot and killed the deceased.
Section 101 of the Evidence Act 1950 is relevant and provides as
follows:

C 101(1) Whoever desires any court to give judgment as to any legal
right or liability, dependent on the existence of facts which he
asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact,
it is said that the burden of proof lies on that person.

D **Prelude To The Incident**

[3] The chain of events leading to this unfortunate incident
unfolded with the arrival of Alexander Sylvester Chuan (DW16) who
came running to the defendant's house in the wee hours of 23
E October 2005 and yelling that the defendant's sons Moses Conrad
Mojuntin (DW13) and Konrad Jr Jomilon Mojuntin (DW14) had
been slashed with samurai swords by masked men outside the SJD
Café. Arriving with him was one Marlindo Lawrence Anduk who
had been struck by a flying duster which was still sticking in his
F ass.

[4] On hearing the news the defendant hurriedly left his house in
a Land Rover arming himself with a shotgun loaded with two
cartridges. He was joined by some family members and friends. The
G purpose of bringing the shotgun was for self protection as according
to the information given by DW16 and Marlindo Lawrence Anduk
those people who chased his sons were armed with samurai swords,
iron rods and flying dusters. In his haste the defendant did not
even put on his shoes and was only clad in a sarong. According to
H him deep down in his heart he thought his two sons had been
maimed or injured and their bodies thrown by the roadside.

[5] The first place they checked was the vicinity of SJD Café.
DW13 and DW14 were nowhere to be seen but the police were
I already at the scene. From SJD Café they went to several other
locations without success. Then the defendant and his group

proceeded to the State Library at Donggongon. While at the library the defendant sat at the rear seat of the Land Rover with DW16 sitting next to him. They tried to contact DW13 and DW14 by phone but to no avail.

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The Shooting

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[6] As the defendant was waiting in the Land Rover suddenly a Kenari came to a screeching halt. He immediately stepped out of the Land Rover with his shotgun. The next thing he saw was three to four persons rushing out of the Kenari holding weapons and shouting murderous words. On seeing this the defendant's family members and friends fled in all directions. The defendant described the situation as "chaotic" and "very tensed". One of the persons who rushed out of the Kenari was the deceased who came charging towards the defendant waving a samurai sword. Christopher William (DW9) in his testimony said that the deceased shouted "Matiii!" as he charged towards the library.

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[7] Fearing for his life and the lives of those who were with him the defendant fired a warning shot in the air but this did not deter the deceased from charging at them. With the remaining cartridge in the shotgun he fired another shot. The shot took a direct hit and the deceased fell to the ground. This halted the attack by the persons who arrived in the Kenari. According to the defendant if he had not used that last bullet he would have been dead by now. In cross examination the defendant agreed with counsel that before he shot the deceased one of his two sons whom they were looking for, namely DW14 was already with him at the library.

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[8] Immediately after the shooting the defendant went to the Penampang Police Station to lodge a report and to surrender his shotgun. When later he was told that his shot had struck the deceased's body he was shocked. The defendant testified that he never intended to harm the deceased, let alone to kill him. He said that if only the deceased had stopped charging at him after the warning shot this unfortunate incident would not have happened.

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The Plaintiff's Version

[9] The plaintiff's version of the incident as narrated by Lim Fong Siong @ Titi (PW5) and Hyder bin Madurin Sani (PW6) is diametrically opposed to the version given by the defendant and his witnesses. PW5's testimony is as follows. In the early hours of 23

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A October 2005 he and five friends, namely Kado, Tito, Boy, PW6 and the deceased had gone to SJD Café after visiting “Golden Palace”. When he and Kado were about to enter SJD Café through the back entrance they were stopped by the defendant’s sons DW13 and DW14. The reason DW13 and DW14 stopped them was
B because the night before Tito had been involved in a fight with their brother Evan. DW13 and DW14 accused them of assaulting Evan but this was denied by PW5 and Kado. This led to a fist fight between DW13 and Kado. According to PW5 he and Kado fled after some others in the opposing group who were armed with
C iron rods interfered. They fled to Yahoo Karaoke near Penampang Baru where they were joined by Tito, Boy, PW16 and the deceased who arrived in a Kenari. PW5 related to his friends the earlier incident involving Kado and DW13 at the SJD Café.

D [10] According to PW5 after drinking hot drinks at Yahoo Karaoke for about one hour he received a telephone call from one Ah Seng who told him that DW13 wanted to settle the matter concerning the fight at SJD Café. He was also told that DW13 and others were waiting at Donggongon. They then proceeded to Donggongon in a
E Kenari driven by PW5. With him were Tito, PW6 and the deceased. When they arrived at the library slightly after 4am. PW5 saw many people gathered there. Some of them were armed with wood and iron pipes. The defendant was also there, clad in a sarong.

F [11] PW5 went on to testify that after he and his friends alighted from the Kenari, suddenly the defendant took out a shotgun from the back of the Land Rover, aiming it towards them. On seeing this he and his friends hurriedly tried to get back into the Kenari but as they were about to enter the car the defendant fired two shots at them. PW5’s reaction was to drive the car towards the
G defendant’s group. This is what he said, in his own words:

H Saya memandu kearah kumpulan Datuk Conrad. Saya terpaksa memandu merempuh kearah kumpulan Conrad untuk lari sebab keadaan sudah menjadi kelam kabut dan saya pada masa itu sudah panik.

I [12] The Kenari was hit with hard objects by the defendant’s group as it sped through them causing the windscreen to break. PW5 only realized that the deceased was not in the Kenari after he had arrived in front of a bank.

[13] PW5 explained that when they proceeded to the library they were not armed as they had no intention of picking a fight with anyone and that their only purpose was to settle the matter concerning the earlier fight between Kado and DW13 at the SJD Café. He went on to explain that at the time the deceased was shot he was just standing outside the Kenari. He denied that the deceased was threatening the defendant's life at that time.

Evaluation Of Conflicting Evidence

[14] The plaintiff's case in essence is that the defendant fired at the deceased deliberately without any provocation or threat to his life. If what PW5 said is true the defendant had committed murder, an offence punishable with death under s. 302 of the Penal Code. I must say at the outset that I find PW5's evidence to be inherently improbable, in particular his claim that the deceased was just standing outside the car and unarmed when he was shot by the defendant. I am inclined to believe the defendant's testimony that the deceased was charging towards him waving a samurai sword when he fired the fatal shot. This version is more probable having regard to the surrounding circumstances of the case.

[15] PW5's claim is that the shots were fired as they were rushing to get back into the Kenari. If that is true pellet marks would have been found on the car but there was none. Those rushing to enter the car, including PW5 himself would also have sustained pellet wounds when the shots were fired but they did not. To appreciate the context of PW5's evidence, reproduced below are his answers to questions 14 and 15 of his witness statement (PWS5):

Apabila kami sampai dan berhentikan kereta, saya turun terlebih dahulu baru Anthony yang berada dibelakang saya turun. **Selepas kami keluar, Anthony berdiri di sebelah saya. Saya dekat pintu. Lepas itu dia terus pergi depan saya.** Kami Nampak Datuk Conrad tiba-tiba ambil senapang dari belakang Land Rover. **Masa itu kami masih di luar kereta.** Apabila saya nampak Datuk Conrad mengangkat senapang, **kami cepat-cepat mahu naik kereta. Sebaik sahaja kami mahu masuk kereta, Datuk melepaskan tembakan 2 kali.**

[16] Unmistakably what PW5 is saying is that the two shots were fired as he and the deceased were about to enter the Kenari. This directly contradicts his own evidence in answer to question 24 of his witness statement where he said the deceased was just standing when he was shot, as follows:

- A Dia hanya **berdiri macam biasa** sebab apa yang kami tahu, orang-orang Moses mahu settle.

[17] The evidence of PW6 on the other hand is that the second shot was fired after the Kenari had sped off leaving the deceased behind. Being at the wheels and focused on getting away from the scene PW5's concentration would have been towards the front. How was it possible then for him to see that the deceased was "berdiri macam biasa" when the second shot was fired? PW6's answer to question 14 of his witness statement (PWS6) also shows that the deceased was not "berdiri macam biasa" when the shots were fired. This is what he said:

- Ya, saya ada nampak Datuk Conrad angkat senapangnya **dan menembak kearah depan**. Masa Datuk Conrad mengangkat senapangnya, **Titi dan Anthony telah pusing berpatah balik menuju ke kereta**.

[18] I do not consider the contradiction to be due to an honest mistake or memory lapse. It is in my view due to a deliberate attempt to mislead the court.

[19] As opposed to the plaintiff's conflicting evidence on this crucial point the defendant's evidence is corroborated by an independent witness Dood Doivin @ George (DW2). DW2's evidence is of critical importance in determining which version is more probable and closer to the truth, bearing in mind absolute unadulterated truth is not possible. His testimony is that at the time of the incident he was on duty as a security guard at Chuah Kah Seng Supermarket which is located "a stone's throw away" from the State Library. His shift was from 8pm to 8am the following day. He testified that at about 4.15am to 4.20am that morning he was sitting on a big rock in front of the supermarket when he saw a Kenari coming by. When the Kenari stopped he saw one man alighting hurriedly from the back door holding a "long object" above his shoulder and "going quickly" towards the Land Rover which was parked in front of the library. He then heard a loud explosion followed by another. After the second explosion he also heard the sound of shattering glass. Just then he saw a police patrol car with its blue siren lights switched on arriving at the scene.

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[20] DW2 went over to see the body that was lying on the road. He saw a samurai sword lying by the right side of the body. Then out of a sudden a man known to him as Edo stepped over the deceased's body and kicked the samurai sword two times towards the library. DW2 heard a policeman by the name of Tony telling Edo not to touch the sword. The sword was later picked up by Lance Corporal Justin bin Birin (DW5) who put it inside the bonnet of the patrol car.

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[21] This part of DW2's evidence is confirmed by DW5 who testified that when he and Corporal Jonathan Pilo ak Mounsey (DW6) were guarding the deceased's body he saw Edo pushing and kicking the samurai sword two times with his legs. On seeing this DW5 ran towards the sword and picked it up. Edo then ran away. There was another police witness who saw the samurai sword lying beside the deceased, namely Lance Corporal Marcellus bin Gamium (DW7).

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[22] In cross examination it was put to DW2 that Edo never kicked the samurai sword and that the sword did not even exist. His curt reply was:

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Saya tidak setuju, saya memang nampak betul.

Credibility Of DW2

[23] I have seen DW2 giving evidence and I found him to be a simple and straightforward witness who showed no sign of falsehood or bias towards the defendant. At the time of the incident he was 56 years old going on 57. It was suggested to him in cross examination that his vision was impaired due to the poor lighting in the area but he stood by his evidence that he could see clearly. He was also questioned why it took him more than two months after the incident to relate the story to the police, implying perhaps that he volunteered and probably manufactured evidence concerning the incident. His answer to the question shows his total disinterest in the case. This was what he said:

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Bukan saya yang mengambil masa. DSP Dzulkifli dari Bukit Aman yang datang untuk mencari saya dan memanggil saya untuk memberi penerangan kepada mereka.

[24] I accept DW2's evidence that the person who rushed out of the Kenari was armed with a long object which having regard to the totality of the evidence must have been the samurai sword the deceased was armed with when he charged at the defendant.

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- A [25] It is clear that DW2's evidence on the existence of the samurai sword is sufficiently corroborated by the three policemen, namely DW5, DW6 and DW7, not that his evidence requires corroboration. The sound of shattering glass that he heard after the second explosion must have been the sound of the Kenari's
B windscreen being smashed as it sped towards the defendant's group. I am satisfied that DW2 is a witness of truth.

Deceased's Involvement In Earlier Incident

- C [26] As for the involvement of the deceased in the incident prior to the shooting the evidence of Fairino Lim @ Fairino bin Mohamad Faisal (DW3), Emil Gau Balan (DW10) and Barry J Ligonjang (DW11) is that he was one of the persons who attacked DW13 during the fight at SJD Café. According to DW3, DW10 and DW11 the deceased chased DW13 with a samurai sword and
D tried to slash him with the sword and when he (the deceased) saw DW10 and DW11 he tried to slash them as well as he thought they were DW13's friends. DW11 was slightly injured when he tried to avoid being slashed. Against this background it is reasonable to conclude that the deceased was armed with the same weapon when
E he and the others proceeded to the State Library.

The Role Of Edo

- F [27] There is no dispute that this person by the name of Edo exists and was present at the scene. But who is he and why did he try to kick the samurai sword away? The evidence of Christopher William (DW9), Adrian R. Amandus (DW12), Petrus Conrad Mojuntin (DW15), and Alexander Sylvester Chuan (DW16) shows that he was one of the persons who arrived in the Kenari at the scene of incident and was armed with an axe. According to DW9
G he was also the person who, at the time Kado and DW13 were trading punches at SJD Café earlier, exclaimed "Saya Ido! Ketua Penampang! Siapa berani?" At the scene of the shooting DW9's evidence is that as the deceased was charging towards them Edo
H shouted "Saaat! Saaat! Saaat! Kasi mati!". There can be no mistaking that he was on a warpath.

- I [28] Despite his role in the whole incident the plaintiff chose not to call Edo as a witness and none of the witnesses called by the plaintiff mentioned his name in their witness statements. I get the distinct impression that the plaintiff was trying to suppress evidence

of his involvement in this case. Having regard to the nature of the plaintiff's claim and the defendant's pleaded defence Edo should have been called to prove his assertion that the deceased was not armed when he was shot by the defendant.

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[29] Based on the testimonies of several witnesses during the inquest into the death of the deceased as shown in encl. 47 it is obvious that he was a central figure in the whole incident. He himself gave evidence as deponent No. 11 at the inquest. The plaintiff knew from the start that Edo was the person alleged to have kicked away the samurai sword after the deceased was shot.

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[30] In fairness to the plaintiff he did apply for a postponement of the case in order that he could call Edo but that was made at the eleventh hour and after the defendant had closed his case. The application was objected to by the defendant and I disallowed the application as I saw no valid reason to adjourn the trial. The plaintiff should have called him before closing his case and not wait until the defendant had closed his. The plaintiff could also have made Edo available and ready to give evidence immediately after the defendant closed his case but the plaintiff asked for another date instead without even indicating when Edo would be available.

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[31] In the absence of Edo's side of the story the court is left with the uncontradicted evidence of DW2 and the police witnesses that Edo tried to kick away a samurai sword that was lying next to the deceased's body. Edo's act of kicking away the sword is clear evidence of an attempt to get rid of incriminating evidence against his group. The presence of the samurai sword goes a long way in proving the truth of the defendant's testimony that the deceased was armed when he was shot.

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Result Of Police Investigation

[32] ACP Zulkifli bin Mohamed (DW4) was the officer from Bukit Aman who took over the investigation of the shooting incident from Chief Inspector Mohd Zunaidi bin Junoh (PW4). In cross examination DW4 testified that he was told by the AG Chambers that the investigation carried out by the Penampang District Police was not up to the standard of a vigorous investigation expected of an alleged murder case. This was the reason why he was directed to take over the investigation. DW4 said the focus of his

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A investigation was to determine whether the deceased was carrying a sword as alleged by the defendant and his witnesses. The result of his investigation was that the defendant had shot the deceased in self defence.

B [33] To digress a little, the fact that the Public Prosecutor did not proffer any charge against the defendant in connection with the death of the deceased shows that in all probability he was satisfied that the defendant had indeed acted in self defence.

C **Whether Duty Of Care Owed**

[34] In *Donoghue v. Stevenson* [1932] AC 562 Lord Atkin expounded the following celebrated proposition of law:

D The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

E [35] In *Caswell v. Powell Collieries Ltd* [1939] 3 All ER 722 Lord Wright said:

F Negligence is the breach of duty to take care, which the law requires, either in regard to another's person or his property, or where contributory negligence is in question, of the man's own person or property.

G [36] And in *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co Ltd* [1985] AC 210 HL, Lord Keith of Kinkel had this to say at p. 240:

H The true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff.

I [37] The mere fact that a man is injured by another's act gives in itself no cause of action. If the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right: per Lord

Wright in *Grant v. Australian Knitting Mills Ltd & Ors* [1936] AC 85 PC at p. 103. Thus no duty of care is owed to a neighbour who threatens another with injury to his person, his property or his interest, pecuniary or otherwise. To impose such duty is to accord protection to the wrong party instead of the wronged party. The law will fail to protect the community if defending one's own life, property or interest becomes a civil wrong. It is morally and legally reprehensible to reward such plaintiff with damages in an action founded on negligence. In all such cases the loss must lie where it falls.

Conclusion

[38] On the evidence and having regard to the probabilities of the case I have no doubt that the persons who arrived in the Kenari, including the deceased were armed and had gone to the State Library to settle a score and not to settle a misunderstanding peacefully as claimed by PW5. Revenge was clearly on their minds. I am satisfied that the defendant was under a reasonable apprehension that his death would otherwise be the consequence if he had not fired the fatal shot that killed the deceased. Since he was merely exercising his legal right of private defence the question of being negligent does not arise at all. In the circumstances the claim was dismissed with costs, to be taxed unless otherwise agreed.

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